CASE NOS. 18-11931; 18-12449

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-176715

REPLY BRIEF OF PETITIONER/APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Petitioner hereby provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

1. The name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporation(s), publicly traded entities that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case:

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2. The name of every other entity whose publicly-traded stock, equity, or debt may be substantially affected by the outcome of the proceedings:

None.

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LEGAL ARGUMENT

A. The Board Has Misstated or Misapplied the Law

1. AMS Was Not Allowed to Elicit Material Evidence

The Board, in its Answer Brief, misapplies the law on several points, all of which impact the appeal. First, the Board argues that the ALJ properly sua sponte prevented a witness, Gerardo Luna, from answering a key question on direct examination—whether during a speech to Spanish-speaking masons, AMS Safety Director Aleksei Feliz threatened to lower wages, as was alleged by Acevedo and no one else in attendance—because the question was leading. Answer Brief, at 23-24. The pertinent sequence of questions and answers was as follows:

> Q [counsel for AMS]: Were you at the meeting where Mr. Feliz spoke?
>
> A: Yes.
>
> …
>
> Q: Did you listen to Mr. Feliz give his talk?
>
> A: Yes.
>
> Q: Did you hear the whole talk from start to finish?
>
> A: Yes.
>
> Q: What language was Mr. Feliz speaking?
>
> A: Spanish.
>
> Q: What was Mr. Feliz saying to the masons?

A: He was explaining the reasons why AMS did not want to continue with the Union.

Q: Did Mr. Feliz say anything about wages?

A: He mentioned some things about wages, but nothing about offering extra wages for people who would be with or not with the Union.

Q: Did Mr. Feliz tell the employees that the Company would lower their wages if they voted for the Union?

JUDGE ROSAS: No leading. No leading. He's not with the Union. He's –

Q: Did the –

JUDGE ROSAS: He'd been subpoenaed, but he's not an adverse witness:

[AMS COUNSEL]: I'll rephrase the question.

Q: Did Mr. Feliz tell the employees whether their wages would be lowered?

[UNION COUNSEL]: Objection, Your Honor.

JUDGE ROSAS: Sustained. Only what he recalls.

A4: 846-48.

AMS counsel's question to Luna was not leading, because it at no time suggested the answer to him.[1] Luna, after confirming his presence at the meeting,

[1] Indeed, as shown by the quoted testimony, neither the General Counsel nor the Union's counsel objected to the question, until the ALJ intervened.

testified that Feliz "mentioned some things" about wages. AMS counsel proceeded to ask him whether one of those "things" was the alleged threat. As various authorities hold, there is a material difference between asking a yes-or-no question, or drawing a witness's attention to a particular subject to be addressed, which is proper on direct, and suggesting the answer to the witness, which is not. See, e.g., 81 Am. Jur. 2d Witnesses § 660 ("The effect of a leading question is to put words in the witness's mouth so that the testimony is that of the questioner and not that of the witness. A question is not an objectionable leading question where it directs the witness toward a specific matter to be addressed without suggesting an answer.") and id. at § 661 ("Questions calling for a "yes" or "no" answer are not leading unless they are unduly suggestive under the circumstances."); Fletcher v. Honeywell, Inc., 2017 WL 775852 *2 (S.D. Ohio Feb. 28, 2017) (after adequate foundation laid, counsel permitted to ask yes-or-no question to rebut plaintiff's claim).

The ALJ's evidentiary ruling matters, because the judge then used Luna's testimony to corroborate Acevedo's allegation of an unlawful threat, when it is not clear that Luna himself would have done so, had he been allowed to answer. A8: 98, at 17. And that allegation, sustained by the ALJ, formed the basis of the Board's finding that a Section 8(a)(1) violation occurred, which in turn supplied the necessary animus needed to support a Section 8(a)(3) violation. A8: 107, at 3.[2]

[2] In its Initial Brief, AMS plainly and prominently preserved a *[con't]*

2. The Timing of the Discharges Should Be Given Little Weight

Second, the Board mis-cites Inova Health Sys. v. N.L.R.B., 795 F.3d 68 (D.C. Cir. 2015), for the proposition that the timing of disciplinary action alone is sufficient to prove anti-union animus. Inova Health, however, and other cases from federal appellate courts, simply approve the Board's existing formulation that, when taken together, protected conduct, expressions of anti-union animus, and disciplinary action can support an inference that the discipline had an improper motive. Inova Health, 795 F.3d at 82; see also Great Lakes Warehouse Corp. v. N.L.R.B., 239 F.3d 886, 890 (7th Cir. 2001) ("[w]hile timing alone is not sufficient to show coercion or interference, it is a relevant factor for the Board to consider and may strengthen the Board's conclusion if other indicia of coercion or interference are present") (emphasis added). Under the standard argued by the Board here, a union advocate engaging in statutorily-protected activity could not lawfully be disciplined at any time proximate to the activity. The timing of the discipline alone would be sufficient proof that a violation of Sections 8(a)(1) and (3) had occurred. That is not the law,

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challenge to the Board's finding that Feliz's alleged warning to employees during the meeting violated Section 8(a)(1), by reciting the relevant facts, citing to the record and legal authority, and presenting argument. Initial Brief, at 32-34 ("the Board improperly affirmed the two 'other' unfair labor practices, violations of § 8(a)(1), found by the ALJ," including the alleged warning); see U.S. v. Jernigan, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003).

because an employer—as occurred in this case—has the right to apply its disciplinary rules to union adherents and agnostics alike. See Initial Brief, at 31-32.

3. The Board Otherwise Improperly Attributed Animus to AMS

Next, the Board otherwise improperly attributes animus to Feliz's purported "silent glare" at Acevedo during the speech to Spanish-speaking employees, after Acevedo allegedly interrupted Feliz's presentation to disagree with him. Answer Brief, at 21-22. As judges in this Circuit have recognized in another employment-law context, the law is hesitant to ascribe hostility or unlawful motivation to a look. This is because, as compared to verbal or written communication, or even a gesture, a look is subject to extreme degrees of ambiguity and interpretation, and thereby sets an unfairly low bar for a claim. Cf. Borden v. Mendoza, Inc., 195 F.3d 1258, 1255-56 (11th Cir. 1999) (Carnes, J., concurring) ("Title VII requires a baseline of objectively offensive conduct, and that baseline cannot be met with objectively ambiguous conduct that a suspicious employee subjectively perceives to be improper."). And like this element of the test for a hostile work environment under Title VII, the test for whether a particular employer campaign action violates Section 8(a)(1) of the Act is whether a reasonable employee would have been chilled in the exercise of his or her protected activities. See, e.g., N.L.R.B. v. Champion Laboratories, Inc., 99 F.3d 223, 228 (7th Cir. 1996); Mercy Hospital, 366 N.L.R.B. No. 165 (2018) ("[t]he relevant inquiry under Section 8(a)(1) is an objective one:

whether the employer's statements or actions would tend to coerce a reasonable employee") (emphasis added).

"Glaring" at a union supporter has not been held to supply unlawful animus, other than in instances where the context was very strongly supportive. See, e.g., Scientific Ecology Group, Inc., 317 N.L.R.B. 1259, 1259 (1995) (glare used by management during group speech to identify employee blamed for union organizing on premises, in conjunction with management representative standing behind the employee); Peck, Inc., 269 N.L.R.B. 451, 458 (1984) (employer's president stared at employee, who previously had distributed union literature, for fifteen minutes on two separate occasions). It should not have been allowed to do so in this case, where the allegation of silent glaring is the subjective impression of a highly partisan employee. What one person perceives as an angry response is just as easily perceived by others as a speaker's making routine eye contact with another person, or surprise at rudely being interrupted. In an analogous situation, another federal appellate court found a supervisor's smile to be "too slender a reed upon which to find … animus," in part because "people smile for many reasons." Sears, Roebuck & Co. v. N.L.R.B., 349 F.3d 493, 512-13 (7th Cir. 2003).

4. The Board Continues to Usurp AMS's Business Judgment

Last, as AMS argues in its Initial Brief, an employer is allowed to exercise its business judgment when managing employees. Indeed, it is wrong, as a matter of

law, for the Board to usurp that judgment as a kind of super-personnel department, determining sub-categories of offenses and appropriate discipline therefor. This is why it was error for the Board to conjure a disparate-enforcement scenario by claiming that other AMS employees terminated for fall protection violations were guilty of "compound violations," and thus not comparable to Acevedo and Stevenson. Initial Brief, at 41-42. But the Board doubles down on its position. It now contends that AMS's uncontested policy of limiting its zero tolerance policy to fall protection violations witnessed by the Company, rather than by others, "borders on senseless" because it shows "that [AMS] trusts general contractors' accounts of violations enough to discipline an employee, but not to discharge the employee." Answer Brief, at 41. While AMS disagrees with the Board's logic—there is nothing senseless about an employer requiring firsthand knowledge prior to imposing the most severe job consequence—AMS repeats that it is not the province of the Board to substitute its judgment, whether an employer's policy is senseless or not. Cf. N.L.R.B. v. Louis A. Weiss Memorial Hosp., 172 F.3d 432, 446 (7th Cir. 1999) (declining to find animus based on employer's objective employee rating system, because "[w]hether the ALJ, the Board, or this court thinks [the employer's] rating system was unfair, unwise, or falls short of perfection is irrelevant").

B. The Board Mischaracterizes the Facts

The Board, in its Answer Brief, also makes several factual mischaracterizations and errors which AMS wishes to correct here. To wit:

- The Board states that AMS and the Union "maintained a bargaining relationship" pursuant to Section 8(f) of the Act. Answer Brief, at 4. The assertion is incorrect. AMS and the Union entered into a series of memoranda of agreement governing the employment of Union members, as envisioned by Section 8(f), but did not engage in collective bargaining. See 29 U.S.C. § 158(f); A7: 83; A2: 312-17.
- The record contains no testimony or other evidence that any AMS masons, before May 16, 2016, worked inside on the University of Tampa job without using fall protection in situations where fall protection was required under the Company's policy. The Board's assertion to the contrary is wrong. See Answer Brief, at 28. Moreover, with respect to the Board's strained denial that Stevenson contradicted Acevedo on the subject of whether their co-workers at UT were tied off on May 16 (with Acevedo saying they were, and Stevenson saying they were not), nowhere does Stevenson's testimony contain the Board-identified "critical detail" that AMS employees allegedly were working at UT without harnesses before McNett's toolbox talk that morning, only to don

them afterwards. Id. at 39. The Company established at the hearing, without rebuttal, that its toolbox talks were pre-work safety meetings; there would have been no one working beforehand. See A1: 79, A3: 611-13; A4: 755-57.

- In response to AMS's enforcement of a safety rule which existed to save employees from serious injury or death, the Board faults the Company's training program, arguing that AMS failed to physically demonstrate to Acevedo and Stevenson them how to tie off to scaffolding, and did not have them practice tying off to the specific type of scaffolding used at UT. Answer Brief, at 7, 24. While the fact is disputed, the point is that both employees were trained on the Company's rule, lied about this fact when caught in non-compliance, and, when confronted with documentary proof of their training, admitted that they had not told the truth. In this regard, Acevedo's untruthfulness alone should make the ALJ's decision to credit him "inherently unreasonable."
- In the context of Feliz consulting with AMS's owners prior to discharging Acevedo, the Board mischaracterizes the discussion. More specifically, the Board claims that Feliz and the owners discussed Acevedo's pro-Union activities. Answer Brief, at 44. Nowhere in the record does such an account appear, however. Rather, both Feliz and

Ron Karp—the sole witnesses to testify about the conversation—stated only that Feliz called the owners in an abundance of caution, because Acevedo was known to be a Union member and an election was imminent. See A1: 91-94, 119; A4: 873-74, 879-81.

- Last, in what appears to be a typographical error, the job on which Acevedo and Stevenson were trained in fall protection is referred to occasionally in the Board's Brief as "Westmore," rather than "Westshore." See, e.g., Answer Brief, at 7.

CONCLUSION

The NLRB's Answer Brief erroneously describes material facts, and misstates or misapplies governing law. For the reasons set forth in this Reply and in AMS's Initial Brief, the Board erred when it issued a final Order affirming in part and reversing in part the Decision and Report of the ALJ, and finding in each instance that AMS had violated Sections 8(a)(1) and (3) of the National Labor Relations Act. AMS therefore respectfully requests that this Court refuse to enforce the Order, granting AMS such other and further relief as the Court finds just and proper.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in fourteen-point font of Times New Roman.

CERTIFICATE OF COMPLIANCE

I certify that this Reply brief complies with the type-volume limitation set forth in Fed. R. Civ. P. 32(a)(7)(B). This brief contains 3,122 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Linda Dreeben, Deputy Associate General Counsel, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C., 20570, Counsel for Appellee.

I FURTHER CERTIFY that and an original and six copies of the foregoing were transmitted to the Clerk of Court, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia 30303, (404) 335-6100, via Federal Express overnight delivery.

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